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NO. 85-2094

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

SHARP ELECTRONICS CORPORATION,
Cross-Petitioner,

v.

BUSINESS ELECTRONICS CORPORATION,
Cross-Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cross-Petitioner, Sharp Electronics Corporation ("Sharp"), has asked this Court to issue a writ of certiorari to decide whether the rule of per se illegality applied for the past seventy-five years to the fixing of minimum resale prices by agreement between a manufacturer and its dealers should now be overturned in this case. Cross-Respondent, Business Electronics Corporation ("BEC"), has petitioned this Court for a writ of certiorari (No. 85-1910) to review a judgment of the Fifth Circuit Court of Appeals setting aside a jury verdict applying the per se rule against vertical price fixing in BEC's favor.

For the reasons set out below, it is neither necescary nor appropriate for the Court to reexamine the validity of the per se rule itself in the course of determining whether the Fifth Circuit incorrectly applied that rule to the facts of this case. Far from constituting "an important question of federal law which has not been, but should be, settled by this Court", *see* Rule 17.1(c), Sup. Ct. R., as alleged by Sharp, the per se rule against vertical price fixing is one of this Court's longest-standing precedents interpreting the Sherman Act. Moreover, Congress, through legislative action, has emphatically ratified the Court's construction of the Sherman Act. Finally, sound policy supports continued application of the per se rule to vertical price fixing agreements, particularly in cases such as this one, where only the naked restraint of an agreement between a manufacturer and its dealers to fix minimum resale prices is at issue.

BEC respectfully requests that this Court deny Sharp's Cross-Petition.

REASONS FOR DENYING THE CROSS-PETITION

1. Congress Has Unambiguously Ratified The Per Se Rule Against Vertical Price Fixing As Part Of The Sherman Act.

For seventy-five years it has been the law that vertical price fixing constitutes a per se violation of Section 1 of the Sherman Act. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (fixing of minimum resale prices by manufacturer per se illegal). During this period, Congress has amended the antitrust laws on a variety of occasions, but has never overturned the

per se rule against vertical price fixing.[1] The failure of Congress to take any action to alter such a long-standing construction of the Sherman Act has been recognized by this Court as constituting a legislative ratification of the per se rule. Thus, legislative action, rather than judicial decision, is required if that construction is now to be changed:

> "Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. . . . Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. *By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the Legislature. Congress may consider the ex-*

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1. Congress has amended the antitrust laws no less than six times over the past ten years without changing the per se rule against vertical price fixing by a single iota. Antitrust Procedures and Penalties Act of 1984 (Tunney Act), Pub. L. No. 93-528, 88 Stat. 1706; National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815; Foreign Trade Antitrust Improvements Act of 1982, enacted as Title IV of the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233; Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 1980 U.S. Code Cong. & Admin. News 5144; Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 93 Stat. 374; Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390.

In the last major revision of antitrust law relating to vertical price fixing, Congress repealed previous legislation that permitted certain vertical price fixing agreements and endorsed an across-the-board application of the per se rule to all such agreements. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, discussed at pp. 4-7, *infra*.

> *ception that we are not free to read into the statute.*" (emphasis added)

Arizona v. Maricopa County Medical Society, 457 U.S. 332, 354-55 (1982).

It lies with Congress, and not this Court, to decide if the Sherman Act should now be amended by eliminating the per se rule against vertical price fixing. *See Monsanto Co. v. Spray-Rite Service Corp.,* 104 S. Ct. 1464, 1473 (1984) (Brennan, J., concurring) (the per se rule against vertical price fixing in *Dr. Miles* "has stood for 73 years and Congress has certainly been aware of its existence throughout that time. Yet Congress has never enacted legislation to overrule the interpretation of the Sherman Act adopted in that case. Under these circumstances, I see no reason for us to depart from our long-standing interpretation of the Act.")

This conclusion is further strengthened where, as here, Congress has continuously and emphatically voiced its approval of the per se rule against vertical price fixing. In enacting the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45(a)), Congress repealed the so-called "fair trade" exemption for certain State-authorized resale price maintenance agreements under the 1937 Miller-Tydings Amendment to the Sherman Act, Ch. 690, 50 Stat. 693 (1937), 15 U.S.C. § 1, and the 1952 McGuire Amendment to the Federal Trade Commission Act, Ch. 745, 66 Stat. 632 (1952), 15 U.S.C. § 45(a). The legislative history of the Consumer Goods Pricing Act of 1975 provides extensive evidence that Congress was aware of and approved a uniform per se rule against vertical price fixing.

The House and Senate reports accompanying the 1975 Act reflect a clear congressional understanding that repealing "fair trade" meant restoring an unqualified ban on vertical price fixing under the per se rule. The Senate Report stated that:

> "Without these [fair trade] exemptions the agreements they authorize would violate the antitrust laws, . . . [and that fair trade laws] are, in fact, legalized price fixing."

S. Rep. No. 94-466, 94th Cong., 1st Sess. 1 (1975).

The same view was expressed by the House Report accompanying the 1975 Act:

> "An agreement between a manufacturer and a retailer that the retailer would not resell the manufacturer's product below a specified price is an obvious form of price fixing. As such it is per se illegal under Section 1 of the Sherman Act."

H. R. Rep. No. 94-341, 94th Cong., 1st Sess. 2 (1975).

Both the House and Senate Judiciary Committees unanimously reported the Consumer Goods Pricing Act legislation. The Senate then approved the bill by unanimous consent and the House voted 380 to 11 in favor of the 1975 Act.[2] In signing the bill into law on December

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2. 121 Cong. Rec. S20874 (Dec. 2, 1975); 121 Cong. Rec. H7104 (July 21, 1975).

The floor debates attending passage of the 1975 Act are also replete with statements by the bill's sponsors and others acknowledging that by voting to eliminate the sole exception to the per se rule Congress was thereby endorsing a general ban against vertical price fixing. Representative Rodino, a co-sponsor of the bill and Chairman of the House Judiciary Committee and its Sub-Committee on Monopoly and Commercial Law which reported the bill to the House, stated in floor debate that: "they [fair trade laws] have aged to the

12, 1975, President Ford succinctly stated the purpose of the 1975 Act:

> "[The 1975 Consumer Goods Pricing Act] will make it illegal for manufacturers to fix the prices of consumer products sold by retailers."

Public Papers of President Gerald R. Ford, Vol. 11, No. 50, at p. 1368, cited in House Judiciary Committee's Report on Vertical Restraints Guidelines Resolution, H. R. Rep. 99-399, 99th Cong., 1st Sess. 7-8, n.22, *reprinted in* 49 Antitrust & Trade Reg. Rep. (BNA) 952, 954, n.22 (1985).

This Court has likewise concluded that Congress, by enacting the 1975 Consumer Goods Pricing Act, has legis-

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point where they preserve classic restraints of trade, which but for the protective umbrella they provide, would be considered per se violations of the antitrust laws." 121 Cong. Rec. 23659 (1975). Representative Seiberling, also a co-sponsor of the bill, agreed, stating that the fair trade laws shielded practices that "otherwise would have amounted to a per se violation of the Federal antitrust laws." 121 Cong Rec. 23662 (1975). The same views were expressed by Representative Jordan, another co-sponsor (fair trade laws "legitimized what, without the exemption granted by those Acts, would be per se violations of the antitrust laws"), 121 Cong. Rec. 23659 (1975); Senator Brooke, the main sponsor in the Senate ("without these federal statutes, these interstate price fixing conspiracies would be in violation of the most basic of our antitrust laws—the Sherman Antitrust Act and the Federal Trade Commission Act"), 121 Cong. Rec. 38049-50 (1975); Senator Hruska, the ranking minority member of the Senate Judiciary Committee who chaired three of the seven days of sub-committee hearings on the 1975 Act ("such laws allow a manufacturer to enter into an agreement with a retailer to set minimum prices at which his identifiable product may be sold—hence legalizing price fixing"), 121 Cong. Rec. 38051 (1975); Representative McClory ("the enactment of H.R. 6971 would repeal these federal exemptions and thus invalidate state fair trade laws and the contractual provisions supported by such state laws"), 121 Cong. Rec. 23660 (1975); and Representative Van Deerlin, the Chairman of the Subcommittee on Consumer Protection and Finance ("without this helping hand from Washington, such price fixing would be illegal under the antitrust laws"), 121 Cong. Rec. 23661 (1975).

latively ratified the per se rule against the vertical price fixing:

> "The per se illegality of price restrictions has been established firmly for many years. . . . Congress has recently expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States. . . ."

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51, n.18 (1977).

When confronted with "a longstanding statutory construction that Congress has consistently refused to disturb, even when revisiting this specific area of the law", *Square D Co. v. Niagara Frontier Tariff Bureau, et al.*, ____U.S.____ (1986), *reprinted in* [Current Developments] 1986-1 Trade Cas. (CCH) ¶ 67,105 at 62,690, this Court has consistently and properly deferred to congressional intent, rather than itself engaging in the formulation of national economic policy.[3] *See Arizona v.*

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3. As the Court noted in *GTE Sylvania*, the context was strikingly different with respect to the Court's revoking application of the per se rule to vertical nonprice restrictions in 1977. 433 U.S. at 50-52. First, no expression of legislative approval comparable to the 1975 Consumer Goods Pricing Act existed for vertical nonprice restrictions. 433 U.S. at 51, n.18. Second, the per se treatment of vertical nonprice restrictions announced by the Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), represented "an abrupt and largely unexplained departure" from the Court's previous construction of the Sherman Act. 433 U.S. at 47. During the 14-year period from 1963 to 1977, the Court changed its position on vertical nonprice restrictions three times: first analyzing such restraints under the rule of reason, *White Motor Co. v. United States*, 372 U.S. 253 (1967), then abruptly declaring such restraints per se illegal, *United States v. Arnold, Schwinn & Co., supra*, and finally returning to the rule of reason standard, *GTE Sylvania, supra*. Throughout this entire period, however, the Court never even considered judging vertical price fixing agreements by anything other than the "firmly established" per se standard. 433 U.S. at 51, n.18.

Maricopa-County Medical Society, supra, 457 U.S. at 355, n.30 ("[Congress] can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach"), quoting *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610, n.10 (1972).

In *Square D* this Court faced a situation very similar to the claim sought to be raised by Cross-Petitioner in this case. Petitioners in *Square D* asked the Court to overturn a sixty-four year old precedent, *Keogh v. Chicago & Northwestern R. Co.,* 260 U.S. 156 (1922), holding that Interstate Commerce Commission approval of tariff rates fixed in violation of the antitrust laws does not give rise to a private treble-damage action under Section 7 of the Sherman Act. Petitioners argued, among other things, that *Keogh's* ban on treble-damage actions was inconsistent with the policies underlying subsequent legislation affecting interstate carriers under the antitrust laws, although such legislation had not explicitly overruled *Keogh.*[4] The Court rejected that argument, stating that, even assuming *Keogh* was unwise as a matter of policy, it should not be abandoned without explicit legislative action by Congress. ____ U.S. at ____, *id.* at 62,689. The Court reasoned that because Congress had addressed this area of the law in subsequent legislation and had left the *Keogh* rule undisturbed, it was inappropriate for the Court to take the initiative in effecting what would amount to a statutory amendment:

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4. Petitioners relied on the 1948 Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948) (current version at 49 U.S.C. § 10706), and the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, delineating an antitrust immunity for specific rate making activities.

> "Particularly because the legislative history reveals clear congressional awareness of *Keogh* . . . the fact that Congress specifically addressed this area and left *Keogh* undisturbed lends powerful support to *Keogh's* continued viability."

Id.

Whatever policy objections might be made to the *Keogh* rule now, the Court observed that:

> "it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980."

Id. See Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 170 (1983) ("Although Congress is aware of these criticisms, the [Robinson-Patman] Act has remained in effect for almost half a century. And it certainly is not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . ."), quoting *United States v. Cooper Corp.,* 312 U.S. 600, 606 (1941).

This Court's refusal in *Square D* to overturn a long-standing statutory construction absent explicit congressional action is equally applicable to the case at bar. The Court's conclusion in *Square D* rests on the "strong presumption of continued validity that adheres in the judicial interpretation of a statute." ____ U.S. at ____, n.34, *id.* at 62,691, n.34, *citing NLRB v. Longshoremen,* 473 U.S. ____, ____ (1985) (slip op. 22) ("[W]e should follow the normal presumption of *stare decisis* in cases

of statutory interpretation"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").[5] This presumption of *stare decisis* is strengthened where, as in the present case, Congress has addressed the area of law at issue without changing the precedent established by the Court:

> "We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court."

___ U.S. at ___, *id.* at 62,691.

Like the losing petitioners in *Square D*, Cross-Petitioners in the case at bar can point to "no specific statutory provision or legislative history indicating a specific congressional intention" to overturn a longstanding statutory construction of this Court. *See* ___ U.S. at ___, *id.* at 62,689. On the contrary, Congress has consistently and vigorously supported continued application of the per se rule against vertical price fixing. As indicated above, the last major revision of the antitrust laws respecting vertical price fixing by Congress, the Consumer

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5. The Court in *Square D* aptly quoted Justice Brandeis, the author of the opinion in *Keogh*, commenting later upon the presumption of continuity in statutory interpretation:

> "*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation."

___ U.S. at ___, *id.* at 62,691, quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

Goods Pricing Act of 1975, clearly expresses congressional approval of continuing per se treatment for such agreements.

Moreover, as Congress has subsequently revisited this area of the law it has without exception endorsed the per se rule for vertical price fixing. For example, in 1983, when the Justice Department filed briefs for the United States as *amicus curiae* in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), suggesting that the Court reconsider the per se rule against vertical price fixing, Congress quickly enacted legislation amending appropriations for the Department of Justice to prevent the Department from engaging in any activity "the purpose of which is to overturn or alter the per se prohibition of resale price maintenance in effect under the Federal Antitrust Laws." Pub. L. No. 98-166, § 510, 97 Stat. 1102 (1983).

Congress again addressed the issue of per se treatment for vertical price fixing following publication of the Department of Justice's Vertical Restraints Guidelines. On December 9, 1985, the House of Representatives passed a House resolution, H. R. Res. 303, criticizing the Guidelines for "qualifying the accepted rule that vertical price fixing in any context is illegal per se". The House Resolution specifically faulted the Guidelines for proposing to avoid the rule of per se of illegality applied to vertical price fixing agreements since *Dr. Miles.*[6]

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6. The House Judiciary Committee's Report accompanying H.R. Res. 303 reiterates that "Congress, likewise, in 1975 affirmatively expressed its views that retail price fixing is illegal under the antitrust laws by passing the Consumer Goods Pricing Act." House Judiciary Committee's Report on Vertical Restraints Guidelines Resolution, H.R. Rep. No. 99-399, 99th Cong., 1st Sess. 6, *reprinted in* 49 Antitrust & Trade Reg. Rep. (BNA) 952, 953 (1985). The House Judiciary Committee Report specifically criticized the Guidelines for attempting "to dilute or trivialize the generality of the per se rule against price fixing, both horizontal and vertical." *Id.* at 14; *id.* at 956.

In separate legislation signed into law by the President on December 13, 1985, Congress included in the 1986 fiscal year appropriations bill for the Department of Justice a version of H. R. Res. 303 as well as a specific limitation that:

> "None of the funds appropriated in titles II and V of this Act may be used for any activity to alter the per se prohibition on resale price maintenance in effect under the Federal Antitrust laws. . . ."

Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180, 99 Stat. 1136, 1169 (1985).

The Justice Department Appropriation Act further states that the Department's Vertical Restraints Guidelines do not accurately state current antitrust law and are objectionable because:

> "[they] propose the avoidance of the per se rule of illegality applied by the Supreme Court in 1911 in Dr. Miles Medical Company against John D. Park and Sons Company (220 U.S. 373) to price-related restraints of trade and subsequently applied by the Supreme Court *and endorsed by the Congress on many occasions*. . . .
>
> "[and because] such policy guidelines are inconsistent with established antitrust law, as reflected in Supreme Court decisions and statements of congressional intent. . . ." (emphasis added)

99 Stat. at 1169.

The evidence that Congress has ratified the per se rule against vertical price fixing is overwhelming.[7] The Court

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7. It is difficult to imagine a clearer expression of current legislative intent on this issue than that expressed in the current Appropriation Act for the Department of Justice, quoted above, whereby

should follow its own precedents and require that any effort to amend this settled construction of the Sherman Act be addressed to Congress rather than to the Court. This Cross-Petition for writ of certiorari should accordingly be denied. *See also Lewis Serv. Center, Inc. v. Mack Trucks, Inc.*, ____U.S.____, 104 S. Ct. 2678 (1984), (*cert. denied* as to whether per se rule still applies to vertical price fixing agreements).

2. Vertical Price Fixing Should Remain A Per Se Violation Of The Sherman Act.

Vertical price fixing warrants application of the per se rule because it completely and unqualifiedly eliminates price competition generated by dealers. In the present case, BEC's termination by Sharp ended what had heretofore been lively intra- and interbrand price competition by BEC.

This Court has long recognized that price is the most significant dimension in which market competition takes place and is therefore deserving of special protection under the antitrust laws. *See Albrecht v. Herald Co.*, 390 U.S. 145, 154 (1968) (Douglas, J., concurring) ("fixing of prices for resale is conspiciously unreasonable because of the great leverage that price has over the market"); *United States v. Container Corp. of America*, 393 U.S. 333, 338 (1969) ("price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition"); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226, n. 59 (1940) (price is the "central nervous system" of our economy).

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the Department is prevented as a matter of law from engaging in "any activity" to alter the per se rule against vertical price fixing including, for example, filing an *amicus* brief in cases such as the present one.

Accordingly, the Court has distinguished between practices affecting prices only indirectly, such as vertical territorial or customer restrictions which are judged under the rule of reason, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and direct agreements on price which are subject to the per se rule.[8] As the Court noted in *GTE Sylvania*, while overturning the relatively recent application of the per se rule to non-price vertical restrictions:

> "As in *Schwinn*, we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established for many years and involves significantly different questions of analysis and policy. . . . [U]nlike nonprice restrictions, '[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands.'"

433 U.S. at 51, n. 18, quoting *White Motor Co. v. United States*, 372 U.S. 253, 268 (1967) (Brennan, J., concurring).[9]

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8. The per se ban on agreements between competitors (horizontal agreements) allocating territories or customers has been described as arising from the greater likelihood that such agreements will have the same antitcompetitive effects as price fixing. *See United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); ABA Antitrust Section, Antitrust Law Developments (Second) (First Supp. 1983-86) 23.

9. The Court in *GTE Sylvania* also noted that industry-wide resale price maintenance may facilitate cartelization. 433 U.S. at 51, n.18. *See* Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 294 (1975); R. Posner, Antitrust: Cases, Economic Notes and Other Materials 134 (1974); E. Gellhorn, Antitrust Law and Economics 252 (1976); Note, Vertical Territorial and Customer Restrictions in the Franchising Industry, 10 Colum. J.L. & Soc. Prob. 497, 498, n.12.

Under a vertical price fixing scheme, dealers are prevented from adjusting their prices to meet *inter*brand price competition as well as to meet *intra*brand price competition.[10] The invariable result is less price competition for consumers.

Empirical studies of vertical price fixing support this Court's conclusions in *White Motor* and *GTE Sylvania.* For example, a 1970 survey by the Antitrust Division of the Department of Justice of 78 different consumer goods showed that in States where vertical price fixing was illegal (non-"fair trade" States) consumers could purchase more than half the items surveyed at prices lower than in States where vertical price fixing was permitted. Hearings on S. 408 before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 94th Cong., 1st Sess. 174 (1975) ("1975 Senate Fair Trade Hearings"); ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 79, n. 327 (1977) ("ABA Vertical Restrictions Monograph No. 2").[11] Higher prices for consumers are

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10. The fact that, under vertical price fixing agreements, distributors cannot lower their prices in response to competition from other brands represents a significant difference between such agreements and vertical territorial or customer restrictions. Under vertical territorial or customer restrictions there is no hindrance of interbrand price competition since dealers remain free to lower their prices in response to competition from a competing brand. Vertical price fixing, on the other hand, necessarily eliminates such competition.

11. A 1956 Antitrust Division survey compared prices on 119 "fair traded" items (subject to vertical price fixing) in eight cities. For all of the items surveyed, consumers in cities where vertical price fixing was illegal paid on average 19% less than in "fair trade" areas. 1975 Senate Fair Trade Hearings, *supra,* at 174.

Studies by the Justice Department indicate that vertical price fixing practices permitted under the "fair trade" laws increased prices of the affected goods by 18 to 27 percent. *See* S. Rep. No. 94-466, 94th Cong., 1st Sess., 1-3 (1975). Similar findings of supra-competitive prices as a result of vertical price fixing have been re-

the result of protecting dealers from price competition under vertical price fixing agreements:

> "[T]hat 'fair trading' historically resulted from pressure upon producers by retailers, and that it chiefly benefits retailers by insulating them from price competition, is generally accepted. . . . It is difficult to doubt that the 'fair trade' minimum prices are high-margin prices, protecting the inefficient and insuring a more than reasonable return. It would seem that many distributors prosper as price cutters. This could not be the case unless resale price maintenance provided high profit margins."

Testimony of Assistant Attorney General, Thomas A. Kauper, 1975 Senate Fair Trade Hearings, *supra*, at 174, 176.

Preventing dealers from initiating or responding to competition at the retail level also results in decreased price competition at the manufacturing level. Under vertical price fixing agreements, the manufacturer is the sole source of any price reductions for its product. However:

> "As a general rule, the manufacturer will be less likely to make frequent price cuts than individual distributors because of the broader impact of the manufacturer's action."

ABA Vertical Restrictions Monograph No. 2, *supra*, 82.

Vertical price fixing has been found not only to lead to higher prices, but also to lower output, providing yet

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ported by private studies as well. *See, e.g.*, Resale Price Maintenance 96-97 (B.S. Yamey ed. 1966); Grether, Experience in California with Fair Trade Legislation, 24 Cal. L. Rev. 640 (1936); Bowman, The Prerequisites and Effects of Resale Price Maintenance, 22 U. Chi. L. Rev. 825, 830-31, n.326 (1955); Cassady, Maintenance of Resale Prices by Manufacturers, 53 Q.J. Econ. 454 (1939); and sources cited in 1975 Fair Trade Hearings, *supra*, at 175, n.5.

another justification for per se treatment of such agreements. A 1969 study by the Department of Justice

> "suggests that sales volume per retail outlet is systematically lower under resale price maintenance. The almost universal pattern developed in this study was higher sales per store in cities or states without resale price maintenance laws, a lower figure for stores in jurisdictions without the non-signer clause in their 'fair trade' acts, and even lower sales figures for stores in resale price maintenance jurisdictions with a non-signer clause."

1975 Senate Fair Trade Hearings, *supra,* at 176 (Statement of Assistant Attorney General Thomas A. Kauper). *See also id.* at 51-52 (Statement of Thomas Gale Moore); *and see* Lee, The Impact of Fair Trade Laws on Retailing, 41 J. Retailing 210, 212-14 (1965).

The massive amount of empirical evidence condemning vertical price fixing led Congress to endorse across-the-board per se treatment to such agreements in the 1975 Consumer Goods Pricing Act. The same evidence equally supports this Court's continued application of the per se rule to vertical price fixing agreements on the grounds that they result in higher prices and lower output, in addition to facilitating horizontal cartelization.

Cross-Petitioner Sharp has given this Court no ground for reversing itself on the long-standing application of the per se rule to vertical price fixing agreements. Sharp cites several articles arguing that certain vertical price fixing arrangements, in addition to their obvious and immediate anticompetitive effects, may also have some procompetitive effects under certain circumstances. Cross-Petition at 6-7. Sharp, however, misunderstands the role of the per se rule.

As outlined recently by this Court in *Arizona v. Maricopa County Medical Society*, 457 U.S. 330 (1982):

> "The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. . . .
>
> The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of per se rules. . . . As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full blown inquiry might have proved to be reasonable."

457 U.S. at 343-44.

Thus, even if a particular business practice may, under certain circumstances, have some procompetitive effects, this would not be sufficient to make the per se rule inapplicable:

> "Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, n. 16.

The anticompetitive consequences of vertical price fixing are so clear—the immediate extinguishing of intra- and interbrand price competition generated at the retail level —and any arguably procompetitive effects of such agreements are so limited and speculative, that continued application of the per se rule to vertical price fixing is clearly warranted.[12]

A common problem in all vertical price fixing agreements is that they seek to substitute the price judgment of a single manufacturer for the competitive interplay of market forces at the retail level:

> "the solution of letting the manufacturer decide what mix of product and service are desirable, instead of letting the market decide that question, is inconsistent with our whole commitment to a competitive process."

Oversight Hearings of the Subcommittee on Monopolies and Commercial Law, March 9, 1983 (Written Statement of Dean Robert Pitofsky 12).

Vertical price fixing agreements have consistently been condemned as per se illegal in light of the basic policy of the Sherman Act "that the unrestrained interaction

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12. As the Court noted in *Maricopa County, supra*:

> "The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition."

457 U.S. at 345.

Sharp's allusions to supposed procompetitive justifications for vertical price fixing in certain situations are therefore beside the point. Since it is the

> "anticompetitive potential inherent in all price fixing agreements [that] justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application."

457 U.S. at 351.

of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress". *Northern Pac. Ry. v. United States,* 356 U.S. 1, 4 (1958). Accordingly, any combination formed for the purpose or effect of "raising, depressing, fixing, pegging, or stabilizing" prices is condemned as per se illegal under the Sherman Act. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 213 (1940). This Court has therefore rejected all previous attempts by manufacturers to substitute their judgment as to an appropriate retail price for the judgment of competition in the marketplace:

> "[S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold."

Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968). *See Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332, 348 (1982) ("per se rule is grounded in faith in price competition as a market force"); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951) (vertical price fixing agreements "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment"); and *United States v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 221-22 (all schemes "directly interfering with the free play of market forces" are beyond the pale of the Sherman Act, which "protects that vital part of our economy against any degree of interference").

There simply can be no justification for requiring elaborate economic inquiry into the effects of a practice which immediately and conclusively eliminates price

competition by retailers, when weighed against uncertain claims of limited, procompetitive effects under some circumstances that can possibly be made for such a practice.

3. Cross-Petitioner Sharp Engaged In Classic, Naked Vertical Price Fixing Which Is Properly Judged Under A Per Se Standard.

In its Cross-Petition Sharp argues that, when vertical nonprice restrictions become intertwined with vertical price fixing, the result is a series of "irreconcilable decisions" and an antitrust jurisprudence which is incomprehensible to Sharp. Whatever may be Sharp's opinion of the state of antitrust jurisprudence, such considerations are completely irrelevant to the case at bar. In this case, there are no territorial or customer restrictions employed by Sharp which could even arguably complicate a straightforward application of the per se rule to a naked vertical price fixing agreement.

Similarly, Sharp's assertion that the prices of electronic calculators (including its own) declined following BEC's termination is beside the point. Cross-Petition at 3-4. Sharp does not and cannot represent what the price of its calculators *would have been* if BEC had remained in the market free to compete. If past experience is a guide, BEC's competition would have resulted in even lower prices than those actually experienced. This conclusion is reinforced by the fact that, following BEC's termination, the remaining Sharp dealer in the territory increased its gross profit margin on Sharp calculators from 33% in 1972 and 34% in 1973, to 43% in 1974 and 45% in 1975. Tr. 1156, 389-91. *Compare* testimony of Assistant Attorney General, Thomas A. Kauper, 1975 Senate Fair Trade Hearings, *supra,* at 176 ("It is difficult to doubt that 'fair trade' minimum prices are

high-margin prices, protecting the inefficient and insuring a more than reasonable return.")

This case presents a pristine application of the per se rule against vertical minimum price fixing. Whatever difficulties there may be in applying the per se rule in other contexts, no such problems are presented by this case, which involves the simple termination of BEC pursuant to a price-fixing conspiracy between Cross-Petitioner, Sharp, and one of Sharp's other dealers. *See Monsanto, supra,* 104 S. Ct. at 1473. This Court should resist Sharp's attempt to confuse the issues by inviting the Court to address alleged problems which are not presented by the facts of this case.

CONCLUSION

For the foregoing reasons, the Court should deny Sharp's Cross-Petition. This case is no occasion for reexamining the continued validity of the per se rule as applied to the unadorned vertical price fixing engaged in by Sharp.

Signed this 24th day of July, 1986.

Respectfully submitted,

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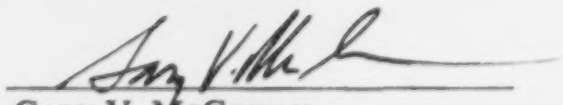
CERTIFICATE OF SERVICE

This is to certify that on the 24th day of July, 1986, three true and correct copies of the foregoing Brief in Opposition to Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by Cross-Respondent, Business Electronics Corporation, were served by airmail on counsel of record for Cross-Petitioner, Peter J. Gartland, Wender, Murase & White, 400 Park Avenue, New York, New York 10022.



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